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IN THE
COURT OF APPEALS OF INDIANA

JUAN CASTILLO	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0608-CR-682
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy J. Barbar, Judge Pro Tempore
Cause No. 49G06-0508-FA-141642

June 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Juan Castillo ("Castillo") appeals his convictions for child molesting as a Class A felony and child molesting as a Class C felony. Arguing that the statements and testimony of his alleged victim are incredibly dubious, Castillo claims that the evidence is insufficient to support his convictions because the State failed to prove beyond a reasonable doubt that, for purposes of child molesting as a Class A felony, he penetrated the sex organ of his alleged victim, or that, for purposes of child molesting as a Class C felony, he touched or fondled his alleged victim with the intent to arouse or satisfy his sexual desires. Castillo also contends that both of his convictions must be reversed because his alleged victim's identification of him as the perpetrator was so flawed as to be insufficient as a basis for conviction. Finding that the incredible dubiosity doctrine has no application in this case and that the evidence is sufficient to support Castillo's convictions, we affirm the judgment of the trial court.

Facts and Procedural History

From approximately January 1, 2005, through August 16, 2005, Alejandra Martin ("Martin") left her two daughters, six-year-old L.M. and three-year-old A.M., in the care of Rosalba Castillo ("Rosalba") when she went to work. Rosalba's husband, Castillo, lived with her, as did several other family members, including the Castillos' teenage son, who is known as "Pancho." L.M. called Castillo "abuelo," Spanish for "grandfather." Tr. p. 211-12.

On multiple occasions while L.M. was in the Castillo home, Castillo touched her. He put his hand both inside and outside L.M.'s clothes and touched her genital area.

Castillo moved his hand when he touched her, and his touching hurt L.M. and made her uncomfortable. Castillo also licked L.M.'s ears and touched her buttocks, which she referred to as her "ohno." State's Trial Ex. 5, p. 15.

L.M. began to complain to her mother, Martin, about soreness and discomfort and stopped wanting to ride her bicycle, which she had previously enjoyed doing. Martin looked at L.M.'s vaginal area and saw "redness" and "irritation" around it. Tr. at 20. When L.M. again complained about pain, Martin again looked at her vaginal area and observed "some white discharge." *Id*. at 22. Nonetheless, when Martin first asked L.M. if anyone was touching her in a sexual manner, L.M. said no. When L.M. again complained of discomfort, Martin again asked her if anyone was touching her. Specifically, she asked if "Pancho" was touching her. L.M. told Martin that "Pancho" "used to play rude with her," "was mean," "was bothering her," "pulls [her] hair," and "pushes [her]." *Id*. at 19, 25-26. However, L.M. consistently denied to Martin that "Pancho" had been touching her in a sexual manner. *Id*. at 25-26, 215-16. Rather, L.M. told Martin that the only person who touched her in a sexual manner was "the old man," or "abuelo," which is what she called Castillo. *Id*. at 26, 216. L.M. told Martin that Castillo touched her vagina, rubbed her, and kissed her ears.

Martin then called the police and took L.M. to the hospital, where L.M. was examined by nurse practitioner Young Sook Theresa Olsson ("Olsson"). Olsson believed that the soreness and redness was caused by something other than just "poor hygiene." *Id*. at 191, 196, 199. L.M. was also interviewed by forensic child interviewer Diane Bowers ("Bowers"). L.M. told Bowers that Castillo laid her down on a bed and touched

her vagina, or "cola," State's Trial Ex. 5, p. 15, on both the inside and the outside, moving his hand while he did so.

The State charged Castillo with: Count I, Child Molesting as a Class A felony for "inserting his hand into the sex organ of [L.M.]";[1] Count II, Child Molesting as a Class A felony for "inserting his hand into the anus of [L.M.]";[2] and Count III, Child Molesting as a Class C felony for fondling or touching L.M. with the intent to arouse or satisfy his sexual desires.[3] Appellant's App. p. 22-23. Before trial, the trial court held a child hearsay hearing regarding the admission of L.M.'s statements to Martin and Bowers. L.M., Martin, and Bowers all testified and were subject to cross-examination. The trial court found that L.M.'s statements were sufficiently reliable to be admitted at trial. Castillo asked the trial court to certify its order for interlocutory appeal, but the trial court declined.

At trial, L.M. testified that Castillo touched her vaginal area with his hand on multiple occasions, that he touched her both inside and outside her clothes, and that he moved his hand while he was touching her. *See* Tr. p. 172-181. She also testified that no one else was present in the room while the molestations were occurring. *Id*. at 77, 169; State's Trial Ex. 5, p. 11. When the prosecutor sought to have L.M. identify the person who had been touching her, L.M. did not want to point to Castillo in court or otherwise describe him. However, she did say that the person who touched her in a sexual manner (1) was in the courtroom, (2) was sitting down to her left, (3) had someone sitting next to

[1] Ind. Code § 35-42-4-3(a).

[2] *Id*.

[3] *Id*. at (b).

him, (4) was darker skinned than the prosecutor, (5) was old, (6) had a moustache, and (7) was not one of the other people sitting to her left that she was willing to look at. *See* Tr. p. 153-55, 158-59. When the prosecutor asked to have the record reflect that L.M. had identified Castillo, the trial court stated, "It will so reflect." *Id*. at 159. L.M.'s videotaped statement to Bowers was played for the jury, and Castillo submitted into evidence the transcript of L.M.'s testimony at the child hearsay hearing.

The jury found Castillo guilty of Counts I and III but not guilty of Count II, the count relating to the alleged penetration of L.M.'s anus. The trial court sentenced Castillo to thirty years on Count I and a concurrent term of four years on Count III. Castillo now appeals.

Discussion and Decision

As an initial matter, it is important to note that Castillo does not appeal the trial court's decision to admit L.M.'s pre-trial statements to Martin and Bowers, i.e., the child hearsay, despite the fact that he sought an interlocutory appeal at the time of the trial court's decision. Though Castillo largely focuses upon L.M.'s credibility as a witness and the weight to be accorded her testimony, he does so in the context of a challenge to the sufficiency of the evidence supporting his convictions. Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. *Id*. We must affirm if the probative evidence and reasonable

inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id*.

The charging information for Count I, child molesting as a Class A felony, stated:

> Juan Castillo, on or about or between January 1, 2005 and August 16, 2005, being at least twenty-one (21) years of age, did perform or submit to deviate sexual conduct, by inserting his hand into the sex organ of [L.M.], with [L.M.], a child who was then under the age of fourteen (14) years, that is: five or six years of age.

Appellant's App. p. 22. The charging information for Count III, child molesting as a Class C felony, stated:

> Juan Castillo, on or about or between January 1, 2005 and August 16, 2005 did perform or submit to any fondling or touching with [L.M.], a child who was then under the age of fourteen (14) years of age, that is: five or six years of age, with intent to arouse or satisfy the sexual desires of Juan Castillo.

Id. at 23.

As to both Counts I and III, Castillo argues that L.M.'s identification of him as the perpetrator "was so flawed as to be insufficient as a basis for conviction." Appellant's Br. p. 15. In this regard, he seeks to invoke the "incredible dubiosity" doctrine, which provides:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). This doctrine, where applicable, allows a court to impinge upon a jury's function to judge the credibility of a witness. *Id*. In this instance, we decline to do so.

Castillo first notes that L.M. initially complained that "Pancho" was doing things that caused her body to hurt. *See* Tr. p. 19. L.M. told Martin that "Pancho," the Castillos' teenage son, played rude with her, was mean, was bothering her, pulled her hair, and pushed her. Castillo maintains that this evidence regarding "Pancho" "actually contradicts [L.M.'s] identification of the person who allegedly molested her." Appellant's Br. p. 24. We disagree. L.M. consistently denied to Martin that "Pancho" was the person who had been touching her in a sexual manner. Rather, the only person L.M. ever said touched her in a sexual manner was "the old man," or "abuelo," which is what she called Castillo. Tr. p. 26, 216. Because L.M. was consistent and unequivocal as to whom it was that was touching her in a sexual manner, the incredible dubiosity doctrine does not apply.

Castillo also stresses the difficulty L.M. had identifying him as the perpetrator at trial. But while L.M. did not want to point to Castillo in court or otherwise describe him, she did say that the person who touched her in a sexual manner (1) was in the courtroom, (2) was sitting down to her left, (3) had someone sitting next to him, (4) was darker skinned than the prosecutor, (5) was old, (6) had a moustache, and (7) was not one of the other people sitting to her left that she was willing to look at. *See id*. at 153-55, 158-59. When the prosecutor asked to have the record reflect that L.M. had identified Castillo, the trial court stated, "It will so reflect." *Id*. at 159. L.M.'s in-court identification of Castillo

was not perfect, but she was consistent in naming Castillo as her abuser. In any event, L.M.'s identification of Castillo as the person who molested her was not so "inherently improbable that no reasonable person could believe it" and therefore does not require application of the incredible dubiosity doctrine. *See Love*, 761 N.E.2d at 810.

Regarding Count I, Castillo also contends that the evidence is insufficient to prove that he inserted his hand into L.M.'s sex organ as alleged in the charging information. Proof of the slightest penetration is sufficient to sustain a conviction for child molesting. *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002), *trans. denied*. Indeed, our statute defining sexual intercourse does not require that the vagina be penetrated, only that the female sex organ, including the external genitalia, be penetrated. Ind. Code § 35-41-1-26; *Smith*, 779 N.E.2d at 115 (citing *Short v. State*, 564 N.E.2d 553, 559 (Ind. Ct. App. 1991)).

Again, Castillo seeks to invoke the incredible dubiosity doctrine with regard to the issue of penetration. He asserts:

> [L.M.'s] account of events and later testimony as to whether a hand, a finger, or nothing had been inserted into any specific area of her body was so riddled with inherently [sic] contradictions that the inconsistencies which resulted would preclude any reasonable trier of fact from making any part of such testimony a basis for conviction.

Appellant's Br. p. 16. Castillo notes that L.M. initially told Bowers that Castillo had touched her inside her vagina. He contends, however, that L.M.'s statement to Bowers is incredibly dubious because L.M. later testified at trial that Castillo only touched her on the "outside" of her "body." Tr. p. 176, 179. We cannot say that these statements require us to invoke the incredible dubiosity doctrine.

First, there is evidence that Castillo touched L.M. on multiple occasions, which means that Castillo may have penetrated her sex organ on one or more occasions and that he may not have penetrated her sex organ on other occasions. If this is the case, then L.M.'s answers are not inconsistent. Second, six-year-old L.M. may have simply been confused by the questions asked. Indeed, when the prosecutor asked L.M., "When he'd move his hand was it just on the outside, or did his, parts of his hand go inside, too?," L.M. initially replied, "I don't understand." *Id*. at 178. If L.M. was confused by the question, her answers do not reveal an inconsistency. The jury was free to take into account L.M.'s confusion and seemingly inconsistent answers on the issue. It did so and determined that Castillo did, at some point, penetrate L.M.'s sex organ. We will not reweigh the evidence.

More importantly, the incredible dubiosity doctrine is not invoked where a witness's testimony is corroborated by circumstantial evidence. *See Love*, 761 N.E.2d at 810. Here, Martin testified at the child hearsay hearing that when L.M. stopped riding her bike because it hurt her, Martin looked at her "vagina" and saw "redness" and "irritation" around it. Tr. p. 20. When L.M. again complained about pain, Martin again looked at her vaginal area and observed "some white discharge." *Id*. at 22. When Martin inquired as to the cause of the redness and soreness, L.M. told her that Castillo had been touching her. *See id*. at 25-26. Martin then took L.M. to the hospital, and Olsson determined that the soreness, redness, and white discharge L.M. was experiencing were the result of more than just "poor hygiene." *Id*. at 191, 196, 199. Based on this

testimony, it was reasonable for the jury to conclude that this redness, irritation, soreness, and white discharge resulted from Castillo's penetration of L.M.'s sex organ.

Castillo also argues, as to Count III, that the State failed to prove beyond a reasonable doubt any fondling or touching of L.M. or that any fondling or touching occurred with the intent to satisfy his sexual desires. We disagree. Concerning whether Castillo ever touched or fondled L.M., L.M. testified that Castillo touched her vaginal area with his hand on multiple occasions, that he touched her both inside and outside her clothes, and that he moved his hand while he was touching her. The State also presented evidence that Castillo touched L.M.'s buttocks and licked her ears. *See id*. at 179, 217. Nonetheless, Castillo maintains:

> [T]he home in which the molestation event or events allegedly took place was normally occupied by four to twelve children and three to nine adults. It is not reasonable that Castillo would attempt to arouse or satisfy his sexual desires by touching a child in a home with so many people there, with numerous others coming and going throughout the day and evening and in such close proximity to his wife and children.

Appellant's Br. p. 24-25. But the jury heard the testimony of L.M. as to the context in which the molestations occurred and believed L.M. Castillo's argument is simply a request for this Court to reweigh the evidence, which we will not do. *See McHenry*, 820 N.E.2d at 126.

As to Castillo's argument that any fondling or touching of L.M. was not done with the intent to arouse or satisfy sexual desires, we note that "[t]he intent element of child molesting may be established by circumstantial evidence and may be inferred from the actor's conduct and the natural and usual sequence to which such conduct usually points." *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000). More specifically, "the

intent to arouse or satisfy sexual desires may be inferred from evidence that the defendant intentionally touched a child's genitals." *Lockhart v. State*, 671 N.E.2d 893, 903 (Ind. Ct. App. 1996). Here, after the jury determined that Castillo had intentionally touched L.M.'s genitals, it was free to infer the intent to arouse or satisfy sexual desires.

The evidence is sufficient to support Castillo's convictions. We therefore affirm the judgment of the trial court.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.